NO. 36166-3-II

COURT OF APPEALS, DIVISION II

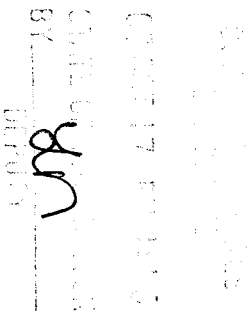
STATE OF WASHINGTON,

Respondent,

vs.

JACOB J. RIVERA,

Appellant,



APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable James B. Sawyer II, Judge
Cause No. 07-1-00030-5

BRIEF OF APPELLANT

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02. The trial court erred in calculating Rivera's offender score when it added one point for his being on community placement or custody at the time of the commission of his current offense.

03. The trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of conviction.

04. The trial court erred in permitting Rivera to be represented by counsel who provided ineffective assistance by failing to object to any claim that he was on community placement or custody at the time of the commission of his current offense.

05. The trial court erred in permitting Rivera to be represented by counsel who provided ineffective assistance by acknowledging that he was on community placement or custody at the time of the commission of his current offense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Rivera's conviction for unlawful imprisonment must be reversed and dismissed for lack of sufficiency of the information? [Assignment of Error No. 1].

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02. Whether the trial court erred in calculating Rivera's offender score when it added one point for his being on community placement or custody at the time of the commission of his current offense? [Assignment of Error No. 2].

03. Whether, as a matter of law, the trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of conviction? [Assignment of Error No. 3].

04. Whether the trial court erred in permitting Rivera to be represented by counsel who provided ineffective assistance by failing to either object to any claim that he was on community placement or custody at the time of the commission of his current offense or by acknowledging that he was? [Assignments of Error Nos. 4 and 5].

C. STATEMENT OF THE CASE

01. Procedural Facts

Jacob J. Rivera (Rivera) was charged by information filed in Mason County Superior Court on January 19, 2007, with Unlawful imprisonment (Domestic Violence), count I, Reckless Endangerment (Domestic Violence), count II, Assault in the Fourth Degree (Domestic Violence), count III, and Reckless Endangerment (Domestic Violence), count IV, contrary to RCWs 9A.40.040, 9A.35.050 and 9A.36.031. [CP 55-56]. Count IV was dismissed prior to trial. [RP 18-19].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [RP 5]. Trial to a jury commenced on March 27, the Honorable James B. Sawyer II presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 106].

The jury returned verdicts of guilty as charged, including special verdicts that each offense was a crime of domestic violence, Rivera was sentenced within his standard range and timely notice of this appeal followed. [CP 3-26].

02. Substantive Facts

On January 16, 2007, at approximately 6:30 p.m., Deputy William Reed was dispatched to the scene of a report of a "female seen running from the woods, yelling for help." [RP 44]. It had been snowing. [RP 26]. In route, Reed came in contact with Rivera, who was parked on the shoulder of the road. [RP 44-45]. Rivera told Reed that he and his girlfriend had gotten into an argument, that there had been physical contact between the two and that she had run off into the woods. [RP 45, 57, 89].

Twenty-year-old Samantha Kenyon, whose relationship with Rivera produced one child, came out of the woods and made contact with the police at about 8:15 that evening. [RP 53, 60]. She was upset and distraught. [RP 47].

> She had red marks on the side of her face and on her neck. The red marks on the right side of her face and neck area were consistent with someone being hit with a blunt object, i.e. a fist or hand. The marks on the left side of her neck were consistent with finger marks, as if someone was grabbing the side of the neck to hold you in place or pull you back.

[RP 48-49].

Earlier that day, Kenyon was home alone when Rivera came over and asked her for a ride into town. [RP 61, 80]. During the drive, Rivera starting asking her if she was cheating on him. She said no. [RP 60-61]. "He just kept asking me how many times I did it. And I said I didn't do it at all. And that was about - that's all he kept saying." [RP 64]. "I told him I didn't want to argue with him anymore. And he said to drop him off, take him up to his mom – towards his mom's and drop him off." [RP 64].

When she told him she needed gas, he told her to "just keep going. And at that point, I knew I wasn't in control of the car." [RP 65]. Four or five times he told her to pull over before telling her, no, keep going. [RP 66, 80]. Kenyon felt she had no choice. [RP 67].

> No, 'cuz he was right up in my face. And then like we kept going and that's when he was like – he jumped up in front of me, and he was talking right close to my face and he was telling me he was gonna hit me.

[RP 67].

> And then he was like, what are you, stupid? Keep going, Keep going. And then he was like – started laughing, and he was like, did you think I was gonna let you stop.

[RP 67].

During this time, there was oncoming traffic. [RP 82]. Kenyon went on to explain that she thought Rivera had a knife "because he was swinging his hand around, and it was clinched...." [RP 69]. She didn't look in his direction

> 'cuz he had his hand right here on my head, so I was like kinda just directly towards the road, and I didn't want to take my eyes off the road either 'cuz I was already crying.

[RP 69].

> - - that's when he grabbed my back of my hair, and he was talking really close to my face....

[RP 70].

"(H)e wouldn't let me – he said don't get out, don't get out, so I didn't get out." [RP 81]. Rivera continued to accuse Kenyon of cheating on him and eventually grabbed her hair and hit her, though she blocked most of it. [RP 70-71]. "I mean it, it hurt, but I blocked most of it." [RP 83].

> And so when went to go pull over, he had me by my hair, and he was telling me to get out. And like I was opening the door, and he was kinda pushing it open and then a car came around the corner. And I

– as soon as my feet hit the pavement, I took off running.

RP 71-72].

She ran into the woods. [RP 72]. "I was scared for my life." [RP 120]. "And finally I seen a cop car with lights on, and so I went down there and flagged him down." [RP 74]. Kenyon estimated that it was 'like a half an hour, 45 minutes" from when Rivera asked her for a ride and she escaped. [RP 72].

Twenty-seven-year old Rivera described Kenyon as his "girlfriend and my baby's mother." [RP 93]. He admitted they had argued but said it was about his concern regarding her "doing drugs, methamphetamine." [RP 96]. He had no concern that that she was cheating on him and denied that he had pulled her hair or that he was worried about her getting out of the car to call the police or that he had told her to stop and then go four or five times or that he ever threatened her with a knife. [RP 96-100, 104-05]. He also denied that he had ever slapped or punched her. [RP 100-01].

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D. ARGUMENT

01. RIVERA'S CONVICTION FOR UNLAWFUL IMPRISONMENT MUST BE REVERSED AND DISMISSED FOR LACK OF SUFFICIENCY OF THE INFORMATION.

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and certainty. 2 C. Torcia, Wharton on Criminal Procedure Section 238, at 69 (13th ed. 1990). In Washington, the information must include the essential common law elements, as well as the statutory elements, of the crime charged in order to appraise the accused of the nature of the charge. Sixth Amendment; Const. art. 1, Section 22 (amend. 10); CrR 2.1(c); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). If, as here, the sufficiency of the information is not challenged until after the verdict, the information "will be more liberally construed in favor of validity...." State v. Kjorsvik, 117 Wn.2d at 102. The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

> (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced

> by the inartful language which caused a lack of notice?

State v. Kjorsvik, 117 Wn.2d at 105-06.

It is not fatal to an information that the exact words of the statute are not used; it is instead sufficient "to use words conveying the same meaning and import as the statutory language." State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must, however, "state the acts constituting the offense in ordinary and concise language...." State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965). The question "is whether the words would reasonably appraise an accused of the elements of the crime charged." State v. Kjorsvik, 117 Wn.2d at 109.

> The primary purpose (of a charging document) is to give notice to an accused so a defense can be prepared. (citation omitted) There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted the crime.

Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

The information, in relevant part, stated:

> ... that said defendant did knowingly restrain another person, to-wit: Samantha Kenyon....

[CP 55].

The elements of unlawful imprisonment were set out in the court's to-convict instruction 9 for count I, which stated in pertinent part:

> To convict the defendant of the crime of Unlawful Imprisonment as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 16th day of January, 2007, the defendant knowingly restrained the movements of another person in a manner that substantially interfered with that person's liberty;
>
> (2) That such restraint was
>
> (a) without the other person's consent or,
>
> (b) accomplished by physical force, intimidation, or deception; and
>
> (3) That such restraint was without legal authority; and
>
> (4) That with regard to elements (1) , (2) and (3), the defendant acted knowingly....

[CP 38].

The information failed to appraise Rivera of all of the elements of unlawful imprisonment. It did not allege that the restraint was "without the other person's consent" or "accompanied by physical force, intimidation, or deception," or "without legal authority" or that the restraint "substantially interfered with that's person's liberty(,)" though this language did appear in the court's to-convict instructions as elements of the offense of unlawful imprisonment. "(S)ince both charging documents and jury instructions must identify the essential elements of the crime for which the defendant is charged [information] and tried [jury

instructions](,)" State v. McCarty, 140 Wn.2d 420, 426 n.1, 998 P.2d 296 (2000), the information is defective, and the conviction obtained on this charge must be reversed and the charges dismissed. State v. Kitchen, 61 Wn. App. 911, 812 P.2d 888 (1991). Rivera need not show prejudice, since Kjorsvik calls for a review of prejudice only if the "liberal interpretation" upholds the validity of the information. See State v. Kjorsvik, 117 Wn.2d at 105-06.

02. THE TRIAL COURT ERRED IN CALCULATING RIVERA'S OFFENDER SCORE AND IN IMPOSING A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM FOR THE CRIME OF CONVICTION.

02.1 Miscalculation

The trial court determined that Rivera's offender score was 8, with a standard range of 43 to 57 months, where he had 7 juvenile nonviolent felony depositions, 3 prior felony convictions and 1 other current offense under a different cause number. [CP 5, 6, 16; RP 160-61]. Defense counsel did not object to the State's following computation:

> And so for juvenile points, he's a seven, three and a half rounds down to three. Three additional prior adult felonies for a six. On supervision for a seven. Other current offense for an eight....

RP 161].

The problem is this. There was no evidence presented that Rivera committed his current offense while on community custody or placement, which would add one point to his offender score under RCW 9.94A.525; and the appropriate box on the Felony Judgment Sentence indicating this is unchecked. [CP 5]. And while it is clear that counsel for Rivera accepted the prosecutor's recitation of his client's criminal history, it can be argued that this did not include acknowledgment that Rivera was on supervision at the time of the commission of his current offense for unlawful imprisonment. When asked if he was going to "except to any of that recitation of history(,)" counsel responded,

> (Defense Counsel): Criminal history, yes, Your Honor.
>
> The Court: Accepted?
>
> (Defense Counsel): Yes. We don't have anything to dispute.

[RP 161].

While issues not raised in the trial court may not generally be raised for the first time on appeal, State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996), illegal or erroneous computations of an offender score that alter the defendant's standard sentence range may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452

(1999). If one point was improperly included in Rivera's offender score calculation under the mere presumption that he was on community placement or custody, when he was not, his standard range would be drop one point, which would lower his standard range to 33 to 43 months. RCW 9A.40.040 and RCW 9.94A525(7).

At sentencing, the State bears the burden of proving all prior convictions before those convictions can be used in an offender score or otherwise. See State v. Ford, 137 Wn.2d at 479-80. A defendant does not acknowledge an incorrect offender score simply by failing to object at sentencing. State v. Ford, 137 Wn.2d at 481-82.

Rivera's sentence should be remanded for resentencing under the general rule that the State is held to the existing record on remand. State v. McCorkle, 88 Wn. App. 485, 500, 945 P.2d 736 (1997). At the sentencing hearing, given that the State presented no evidence to prove that Rivera was on community placement or custody at the time of the commission of his current offense, there was nothing to object to in this regard. Unlike the facts in State v. Ford, 137 Wn.2d at 485, where our Supreme Court remanded for an evidentiary hearing to permit the State to prove the disputed matters because "defense counsel has some obligation to bring deficiencies of the State's case to the attention of the sentencing court(,)" 137 Wn.2d at 485, here there was no "State's case."

In In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005), a three-strikes case where Cadwallader had failed to object to his criminal history at sentencing, and thereby failed to put the sentencing court on notice that one of his prior strike convictions had washed out, our Supreme Court ruled that the State would be held to the existing record on remand, stating, "(g)iven that Cadwallader had no obligation to disclose his criminal history, it follows that he had no obligation to object to the State's failure to include the 1985 Kansas theft conviction in his criminal history." Id. at 876.

Here, because Rivera was under no obligation to prove he was on community supervision or custody – that being the State's exclusive burden – he was under no obligation to object to the State's failure to present any evidence to establish this fact. In short, since there was no "State's case" vis-à-vis this fact, and thus nothing warranting an objection from Rivera, his sentencing on this issue should be remanded and the State held to the existing record.

02.2 Community Custody

A sentencing court "may not impose a sentence providing for a term of confinement or community supervision, community placement, or custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5);

State v. Hudnall, 116 Wn. App. 190, 195, 64 P.3d 687 (2003); State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004) (the total punishment, including imprisonment and community custody, may not exceed the statutory maximum). Nothing in the statute grants the sentencing court the authority to speculate that a defendant will earn early release and to impose a sentence beyond the statutory maximum based on that speculation. If the Legislature had so intended, it would have made that provision.

In addition to sentencing Rivera to 57 months for unlawful imprisonment, count I, the trial court imposed 9 to 18 months' community custody for the same offense. [CP 9]. This sentence exceeds the statutory maximum sentence of five years imprisonment for the offenses, [CP 6], with the result that this court should remand for resentencing within the five-year statutory maximum for this conviction.

03. RIVERA WAS PREJUDICED AS A RESULT OF HIS TRIAL COUNSEL'S FAILURE TO EITHER OBJECT TO ANY CLAIM THAT HE WAS ON COMMUNITY SUPERVISION OR CUSTODY AT THE TIME OF THE COMMISSION OF HIS CURRENT OFFENSE OR BY ACKNOWLEDGING THAT HE WAS.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of

reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this court find that trial counsel waived the issue relating to the trial court adding one point to his offender score for being on community supervision or custody failing to object to this or by

acknowledging it, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object to or acknowledge this for the reasons set forth in the preceding section of this brief. Had counsel properly acted, the trial court would not have added the one point based on this record.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self evident: but for counsel's failure to object to or by acknowledging the claim here at issue, the trial court would not have added the one point based on this record, with the result that Rivera's offender score would have been lower, as previously set forth.

E. CONCLUSION

Based on the above, Rivera respectfully requests this court to reverse and dismiss his conviction for unlawful imprisonment and to remand for resentencing consistent with the arguments presented herein.

DATED this 16th day of October 2007.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 16th day of October 2007.

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